In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 281

MURDO F. MARGESON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinion of the district court is reported at 246 F. Supp. 219.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1966. The petition for a writ of certiorari was filed on June 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether shoes worn by petitioner during the robbery and at the time of arrest were lawfully seized.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Maine of robbing a Federal Loan and Building Association, in violation of 18 U.S.C. 2113 (R. 2),[1] and sentenced to imprisonment for twenty years (R. 97-98). On appeal, petitioner contended that his shoes should not have been admitted into evidence at trial because they were "mere evidence only" and had been seized from his person in the course of an arrest not upon probable cause. The court of appeals unanimously affirmed the conviction (Pet. App. A).

Two armed men robbed the Federal Loan and Building Association located in the Mill Creek Shopping Center of South Portland, Maine, at about 2:00 p.m. on June 5, 1964 (R. 6-7, 73). FBI agent Gibbons arrived at the scene shortly. During the course of his investigation, he learned that at about 11:30 that morning, an employee of a nearby supermarket had observed two men in a green Chevrolet, one of whom got out and walked around the vicinity of the bank in such an unusual manner that the employee decided to record the registration number of the car (R. 8-9). This information was relayed to the FBI

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[1] "R" refers to the "Record Appendix to Brief for Appellant" in the court of appeals.

office in Concord, New Hampshire, which reported back that petitioner was the registered owner of the car and was at the time on bail pending appeal from a bank robbery conviction in Massachusetts (R. 9).

Richard Morse, the assistant manager of the bank, gave Agent Gibbons a general description of both robbers, and stated that he felt he could identify one of the men if he saw him again—though this robber had worn a mask[2]—by the distinctive hair growth on the back of the robber's head (R. 13-14, 73-74). Morse stated that this robber had jumped onto the counter in the bank to get to the teller's cages (R. 9). Agent Gibbons examined the counter and found heel prints of an unusual design. Sketches were made of the prints and the section of the counter involved was removed for preservation (R. 9-11). In the meantime, an alert was broadcast for petitioner's automobile (R. 11), and between two and three hours after the robbery petitioner and another man were observed in the car in the vicinity of Concord, New Hampshire (approximately 100 to 125 miles from the scene of the robbery) proceeding on a highway route away from the Maine border (R. 12-13).

On the day following the robbery, Gibbons took Morse to Concord for the purpose of viewing petitioner for identification, but petitioner could not be lo-

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[2] On the evening of the robbery, FBI agents showed Morse and other bank employees a number of photographs, including pictures of petitioner. They were unable to identify either of the robbers (R. 37-38, 74-78). Morse was also unable to identify petitioner's picture when shown to him the next day by Agent Gibbons (R. 8-9).

cated (R. 14). The same procedure was followed two days later, on Monday, June 8, 1964 (R. 14), and petitioner was located driving his car on an interstate highway leading to Concord. As Agent Gibbons was overtaking and passing petitioner's car, Morse was able to observe the back of petitioner's neck, his profile, and the general shape of his head and shoulders (R. 15, 46-49, 80). Morse told Agent Gibbons that petitioner was the robber who had ordered him around the bank (R. 15, 48-51, 80). Agent Gibbons then stopped and obtained telephone authority to file a complaint for an arrest (R. 16).

While Gibbons was using the telephone, petitioner, under surveillance by other agents, parked his car on Main Street in Concord. Agent Gibbons and Morse proceeded to Main Street, where Morse observed petitioner walking on the sidewalk. He again stated to Gibbons that he was convinced petitioner was one of the robbers (R. 16-18, 81). From Main Street, petitioner drove to the Capitol Shopping Center in Concord and entered a department store. When he did not come out of the store, Agent Gibbons became concerned that petitioner had noticed the surveillance and had left by another exit (R. 17, 23-25). Gibbons then radioed the Boston FBI office and obtained approval of his decision to proceed with the arrest before a warrant could be issued (R. 17-18, 23-25). Other agents and police officers arrived to cover all exits from the store. Shortly afterwards, an FBI agent observed petitioner leave the store, get into his car and start to drive away from the parking area.

The agent intercepted petitioner and arrested him (R. 18, 26, 64-69). He was immediately searched for weapons. Agent Gibbons soon arrived on the scene. He took petitioner's shoes, and examined the heels, observing that they were the same pattern as the heel prints observed on the bank counter (R. 18-22, 29-30). He then stated in petitioner's presence that he was seizing the shoes as important evidence (R. 18-19, 30), but would permit petitioner to wear them until they could get him something else to wear (R. 20, 30). The shoes were taken from petitioner about an hour after he arrived at the Concord police station (R. 54-57, 59-60). The shoes were admitted into evidence at trial together with expert testimony that the heel prints on the bank counter had been produced by the heels on the shoes (R. 92-97).

ARGUMENT

1. Petitioner's contention that he was arrested without probable cause (Pet. 21-24) is refuted by the facts set forth in the Statement, *supra*. Agents of the Federal Bureau of Investigation are authorized to make arrests without a warrant for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony. 18 U.S.C. 3052; see, *e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91; *Ker* v. *California*, 374 U.S. 23, 34-35; *Henry* v. *United States*, 361 U.S. 98, 100-102; *Draper* v. *United States*, 358 U.S. 307, 312-314. This test was met in the instant case. The arresting agents

knew that a car registered in petitioner's name had been observed with two men in it in the area of the bank shortly before the robbery; that this car, with petitioner and another man in it, had been observed proceeding away from the area of the robbery at a time and distance consistent with the normal travel time from the scene of the crime; and that petitioner had a recent prior conviction for bank robbery. Most important, the assistant manager of the bank positively identified petitioner as one of the robbers.

2. Petitioner's contention that seizure of his shoes from his person incidentally to his arrest was impermissible even if the arrest was lawful (Pet. 13-19) is without merit. He relies on the principle that a search for mere evidence is improper. See, *e.g.*, *Boyd* v. *United States*, 116 U.S. 616, 622-623; *Gouled* v. *United States*, 255 U.S. 298, 310-311. However, what was seized here were the shoes that the accused had worn *while committing the crime.* If not strictly a means or instrumentality of committing the crime, they were nevertheless akin to that; they were far more than mere evidence—as, for example, an incriminating document that the accused happened to have in his pocket when he was arrested. Thus the courts of appeals have repeatedly held that clothing worn by an accused while committing a crime, being an integral element of the criminal act, is subject to seizure incidentally to a lawful arrest. See, *e.g.*, *United States* v. *Caruso*, 358 F. 2d 184 (C.A. 2), petition for a writ of certiorari pending, No. 133 Misc., O.T. 1966; *Whalem* v. *United States*, 346 F. 2d 812, 813-814 (C.A.D.C.), certiorari denied, 382 U.S. 862; *Cald-*

well v. *United States*, 338 F. 2d 385 (C.A. 8), certiorari denied, 380 U.S. 984; *Robinson* v. *United States*, 283 F. 2d 508 (C.A.D.C.), certiorari denied, 364 U.S. 919; *Charles* v. *United States*, 278 F.2d 386, 388-389 (C.A. 9), certiorari denied, 364 U.S. 831; *United States* v. *Guido*, 251 F. 2d 1, 3-4 (C.A. 7), certiorari denied, 356 U.S. 950; *Morton* v. *United States*, 147 F. 2d 28 (C.A.D.C.), certiorari denied, 324 U.S. 875.[3]

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[3] *Morrison* v. *United States*, 262 F. 2d 449 (C.A.D.C.), is not to the contrary. In that case, clothing *not* worn during the commission of the crime was seized during an illegal search of the defendant's home. In *Hayden* v. *Warden, Maryland Penitentiary*, C.A. 4, No. 10,061, decided April 21, 1966, the defendant had been chased from the scene of the robbery to his home, where he immediately removed and hid his clothes. Police discovered and seized the clothes prior to arrest while conducting a lawful search of the premise for the robber. The court of appeals held that the clothes were not admissible, because "mere evidence only." For the reasons stated in the text, we submit that *Hayden* is erroneous. The instant case is in any event distinguishable, since petitioner's shoes were seized *from his person* incidentally to a lawful arrest on probable cause. The dissenting judge in *Hayden* stated (slip opinion, p. 19) that the clothes could unquestionably have been seized lawfully had the defendant been wearing them at the time of his arrest. For, at the least, the seizure of the person in an arrest comprehends articles found on his person, which he used in committing the crime.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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